FILED
JAN 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN ARTHUR SCOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

WILLIAM C. MARIETTI
820 Terrace at Clay
Muskegon, Michigan 49440

ALEXIS J. ROGOSKI
704 Hackley Bank Building
Muskegon, Michigan 49440

Counsel for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	2
CONSTITUTIONAL SECTION, STATUTE AND RULE INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
THE DOUBLE JEOPARDY CLAUSE BARS AN APPEAL BY THE GOVERNMENT OF A DECISION BY THE TRIAL JUDGE RENDERED AFTER ALL PROOFS ARE SUBMITTED THAT THE DEFENDANT CANNOT BE CONVICTED OF THE OFFENSE CHARGED, WHERE, IF SUCCESSFUL, THE APPEAL WOULD RESULT IN A SECOND TRIAL	6
A. The protection of the Double Jeopardy Clause extends beyond mere acquittals to include any final decision in a defendant's favor that he cannot be convicted of the crime charged	6
B. Respondent's motion to dismiss the indictment did not bar subsequent objection to being twice placed in jeopardy for the same offense	19
1. A motion to dismiss made during trial, after having been denied without prejudice prior to commencement of trial, does not deprive the respondent of the protection of the Double Jeopardy Clause	19
2. The mere possibility of a motion in arrest of judgment, when not made, does not determine whether the Double Jeopardy Clause applies where the proceedings have been concluded in a defendant's favor	22
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:	*Page*
Downum v. United States, 373 U.S. 734	3,13
Illinois v. Somerville, 410 U.S. 458	3,7,8,9
Finch v. United States, ____ U.S. ____, 53 L.Ed2d 1048, 97 S.Ct. ____	5,12
Green v. United States, 355 U.S. 184	9,24
Lee v. United States, ____ U.S. ____, 53 L.Ed2d 80 97 S.Ct. ____	*passim*
Serfass v. United States, 420 U.S. 377	17,22,23
United States v. Ball, 163 U.S. 662	7
United States v. Covington, 395 U.S. 57	10,11
United States v. Dinitz, 424 U.S. 600	19,20,21,22
United States v. Jaramillo, 510 F.2d 808	18
United States v. Jenkins, 420 U.S. 358	*passim*
United States v. Sisson, 399 U.S. 267	7,10,11,12,14,15
United States v. Wilson, 420 U.S. 332	*passim*
Constitution, statutes and rules:	
United States Constitution:	
Fifth Amendment	2,6,12
Double Jeopardy Clause	*passim*
Criminal Appeals Act, 18 U.S.C. 3731	6,15,16
Federal Rules of Criminal Procedure 12(e)	5,24,25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN ARTHUR SCOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

Petitioner has cited the relevant opinions in its brief and accompanying appendix.

QUESTION PRESENTED

Does the Fifth Amendment prohibit the United States from subjecting the Respondent to a second trial when the judge, at the conclusion of all the proofs in the first trial by jury, dismissed the indictment with prejudice?

CONSTITUTIONAL SECTION, STATUTE AND RULE INVOLVED

The petitioner has cited the relevant sections of the Constitution, United States Code and Federal Rules of Criminal Procedure.

STATEMENT

Respondent accepts the petitioner's statement subject to the following modifications. After the government had submitted its proofs and rested, the respondent renewed his motion to dismiss Counts I and II due to the pre-accusation delay occasioned by the government. The judge denied the motion at that stage for the reason that he needed to hear more evidence, and the trial proceeded until both sides had concluded their proofs.

The petitioner's characterization of the respondent's theory is inaccurate. The respondent presented ample evidence to establish that the informant's motive for testifying was to prevent respondent from testifying against the informant in a charge pending against him.

At the conclusion of all of the proofs from both parties, the judge dismissed Counts I and II with prejudice, reserving Count III for the jury which acquitted respondent.

SUMMARY OF ARGUMENT

The ultimate issue to resolve in this case is whether or not the Double Jeopardy Clause precludes the appellate courts from reviewing the dismissal of Count I of the indictment. At the stage in the lower court proceedings where Count I was dismissed, jeopardy had attached. The trial by jury had commenced and both sides had completed submission of their proofs through several days of testimony and exhibits. *Downum v. United States*, 372 U.S. 734.

Given the fact that jeopardy had attached, an appeal by the government, absent a showing of an exception to the Double Jeopardy Clause, would be barred. One of the commonly recognized exceptions is the situation of a mistrial that is declared due to manifest necessity. *Illinois v. Somerville*, 410 U.S. 458. Clearly, this case did not involve a mistrial. Nor was this a situation where there was a verdict of guilt rendered which could simply be reinstated should the government prevail on appeal. Rather, the order dismissing Count I with prejudice was a final decision favorable to the defendant that he could not, under any circumstances, be convicted of the crime charged.

The fact that the respondent moved and requested the final order of the court does not waive his constitutional right to be free from being placed in double jeopardy. To hold otherwise would ignore the fact that the focus of concern in the area of double jeopardy is to preclude multiple trials. *United States v. Martin Linen Supply Co.*, ____ U.S. ____, 51 L.Ed2d 642, 97 S.Ct. ____. Furthermore, in this case, the respondent did not deliberately defer his request for dismissal until after

jeopardy attached in order to frustrate any attempt at appeal by the government. The defendant moved for dismissal prior to commencement of the trial and it was the decision of the judge to deny the motion without prejudice until after the evidence had been presented from both sides. The judge did not simply reserve decision on the motion until after trial. Rather, the motion failed and was denied without prejudice. It was only after the respondent had been subjected to a lengthy trial, that the judge reversed his earlier ruling and dismissed Count I of the indictment.

The most recent decisions of this court considering the applicability of the Double Jeopardy Clause govern the existing situation. The judge granted the dismissal on the ground that the respondent could not, under any circumstances, be convicted of the crime charged. Thus, the order contemplated an end to all prosecution and did not involve a mistake by the government that could be corrected. *See, Lee v. United States*, ____ U.S. ____, 53 L.Ed.2d 80, 97 S.Ct. ____. The nature of a finding that due process was denied because of pre-indictment delay precludes a restoration of that due process on a retrial. The basis for such a ruling involved a finding that the respondent was prejudiced by loss of memory. How can that loss possibly be restored prior to a second trial? To the contrary, as more time elapses, the memory deteriorates further and the original error is magnified.

The fact that the trial judge did not make a finding of guilt or innocence is not a critical factor. Certainly, had there been a finding of guilt, the appeal would be permitted as in *United States v. Wilson*, 420 U.S. 332. However, where as here, there was no such formal finding, a successful government appeal would result in

retrial as opposed to mere reinstatement of a verdict. Under these circumstances, the Double Jeopardy Clause deprives the appellate courts of jurisdiction to review the lower court decision. *Finch v. United States*, ____ U.S. ____, 53 L.Ed2d 1048, 97 S.Ct. ____.

This conclusion is not altered by Federal Rule of Criminal Procedure 12(e). The order denying the motion to dismiss was entered before Rule 12(e) became effective. The judge did not defer decision on the motion until trial, but, rather, denied it due to a failure of proof. The decision to hear the motion was made by the court after it refused to reconsider its decision until all evidence had been presented. The respondent had acted diligently and properly in attempting to obtain a pre-jeopardy motion. Any alleged error by the court in regard to Rule 12(e) does not render the Double Jeopardy Clause inapplicable. Such an error cannot be considered unless there is jurisdiction for review. The Double Jeopardy Clause bars any such review because the trial court rendered a final decision at the conclusion of the presentation of all evidence that the respondent could not be convicted of the offense charge.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE BARS AN APPEAL BY THE GOVERNMENT OF A DECISION BY THE TRIAL JUDGE RENDERED AFTER ALL PROOFS ARE SUBMITTED THAT THE DEFENDANT CANNOT BE CONVICTED OF THE OFFENSE CHARGED, WHERE, IF SUCCESSFUL, THE APPEAL WOULD RESULT IN A SECOND TRIAL.

A. The protection of the Double Jeopardy Clause extends beyond mere acquittals to include any final decision in a defendant's favor that he cannot be convicted of the crime charged.

The Government has invoked the jurisdiction of the Sixth Circuit under the purported authority of 18 U.S.C. §3731, which provides as follows:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

While historically the Government's right to appeal a decision in a criminal case has been limited by statutory provisions, respondent acknowledges that the only relevant existing limitation is the Double Jeopardy Clause of the Fifth Amendment to the Constitution. *United States v. Wilson*, 420 U.S. 332. Thus, an examination of the Double Jeopardy Clause as interpreted by this Court is essential to a disposition of this case.

It is clear that acquittals are not appealable by the government. The fundamental principal of double jeopardy is that "[A] verdict of acquittal could not be received, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *United States v. Ball*, 163 U.S. 662.[1]

The petitioner contends that the dismissal appealed from in this case was not an acquittal and, thus, is not subject to the restraint of the Double Jeopardy Clause. While respondent acknowledges that the label attached to the action of the trial judge was a dismissal with prejudice rather than "acquittal", the terminology is not decisive. *See, United States v. Sisson*, 399 U.S. 267. The petitioner would analogize the instant case to a line of decisions culminating with *Illinois v. Somerville*, 410 U.S. 458. In that case a jury was empanelled to hear the case. At that point, the attorney for the government moved for a mistrial after discovering that the indictment was defective.

The district judge granted the requested relief over the defendant's objection. The Court in *Somerville* held that a new trial would not violate the Double Jeopardy Clause since the district court actually lacked jurisdiction to hear the case and reversal on appeal would have been a certainty had the defendant been convicted. Under these circumstances, manifest necessity and the ends of public justice would be served by a new trial. The government in the instant case suggests that this reasoning opens the door for appeal since the ends of public justice so require.

---

[1] This axiom is any acquittal whether by jury, judge, or on post verdict motion. *United States v. Martin Linen Supply Co.*, ____ U.S. ____, 51 L.Ed2d 642, 97 S.Ct. ____.

However, respondent submits that this case is distinguishable from *Somerville* in significant particulars.

The district court herein had jurisdiction pursuant to a valid indictment that sufficiently charged a criminal offense under the laws of the United States contrary to the *Somerville* situation. Furthermore, and most importantly, the decision in this case was a final ruling favorable to the respondent. Counts I and II were dismissed by the Court at the conclusion of the evidence and the jury returned a not guilty verdict as to Count III. In *Somerville* there was no ruling favorable to the defendant as here. The trial was merely terminated without an order or judgment favorable to the petitioner. The significance of this distinction was noted by Justice Renquist in the majority opinion of *United States v. Jenkins*, when he stated, "We disagree with this analysis [analogizing *Jenkins* to *Somerville*] because we think it is of *critical importance* whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." 420 U.S. 358 at 365, n.7 (emphasis supplied[2] Thus, the reasons underlying retrial after a mistrial are not relevant to a situation such as the instant case, where the trial terminates in the defendant's favor.

Another factor distinguishing the *Somerville* line of cases is the fact that, although jeopardy attached, there had been no trial. This mistrial was declared in *Somerville* prior to the introduction of any evidence. This factor is

[2] This Court has recently reaffirmed this reasoning by permitting appeal of the dismissal of a defective indictment. *Lee v. United States*, ____ U.S. ____, 53 L.Ed2d 80, 97 S.Ct. ____.

significant when the reasons for the constitutional prohibition against double jeopardy are considered.

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . The underlying idea, one that is deeply ingrained in at least, the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88

In the instant case, all of the evidence on behalf of the prosecution and the defense had been presented before the trial was terminated in appellee's favor. This presents the optimum situation for the government to review its mistakes and take a second chance at convicting the defendant – a chance the double jeopardy clause does not permit. See, *United States v. Wilson*, 420 U.S. 332. Thus, the *Somerville* court would deny a retrial even in a mistrial situation if the impetus for discharging the jury is bad faith conduct by the judge or prosecutor since that is tantamount to harassment of the defendant by successive prosecutions which afford the government a more favorable opportunity to convict the defendant after carefully examining the previous record for tactical errors.

As more recent Supreme Court decisions reflect, the concern expressed in *Green* and *Somerville* is the controlling factor in assessing the applicability of a bar to

further proceedings under the Double Jeopardy Clause. In *United States v. Sisson*, 399 U.S. 267, the petitioner had presented three pretrial motions to dismiss in the district court, all of which were denied. The case proceeded through trial and the jury returned a verdict of guilty. The defendant made a post-verdict motion for arrest of judgment. The court granted the motion, however, the opinion cited grounds contained in the pretrial motion and dismissed the indictment. While the court was concerned with the application of the now repealed Criminal Appeals Act, the opinion discussed the constitutional implications of a new trial. A protracted discussion of the legislative history of the Act concluded that Congress has shown concern for the plight of defendants exposed to added expense and anxiety together with the possibility of multiple trials in the event of a successful appeal by the United States. The Court rejected the notion that the applicability would depend upon the label the district court attached to its order, e.g. dismissal or acquittal. Rather, a reviewing court must examine the basis for the decision in the lower court in order to determine whether the action was in fact an acquittal. *United States v. Sisson, supra* at 279, n.7

The test developed by the *Sisson* court was that the dismissal or arrest of judgment must not be based on any matters not apparent on the face of the indictment itself. The issue raised by the defense must be capable of determination without trial of the general issue and the trial of the facts surrounding the commission of the offense must be of no assistance in determining the validity of the defense. *United States v. Covington*, 395 U.S. 57. If those circumstances exist, the double jeopardy clause would not bar a retrial after government appeal.

However, if the lower court relied upon facts established at trial to support his decision to dismiss or acquit, the order will bar an appeal by the government. The Court concluded in *Sisson* that the action of the lower court was an acquittal since the judge considered matters not contained in the indictment itself but developed at trial. The district judge went beyond the face of the record relying on evidence introduced at trial including observation of the demeanor of the petitioner. In fact, the trial judge could not have arrived at his decision without hearing the facts of the case.

The *Sisson* opinion distinguished those facts from *United States v. Covington*. The Court had permitted appeal in *Covington*. However, that case involved a dismissal before trial without submission of facts to a jury or any evidentiary hearing. In *Sisson*, the court's dismissal followed presentation of evidence to the jury. As a result, the decision was not subject to appellate review.

Respondent submits that the facts in the instant case are analagous to those of *Sisson*. Respondent presented his motion to dismiss for preindictment delay before trial, at the conclusion of the government's case in chief and at the conclusion of all of the proofs. The pretrial denial of the motions was made without prejudice since the court wanted to consider facts developed during the trial. That the district judge wanted to hear the evidence in the case to assist in deciding whether to dismiss or acquit the respondent is clear from the pretrial order which denies the motion without prejudice "so that the defendant may reassert it if he chooses after all evidence has been presented." (A. 15) The trial court considered evidence brought out in the trial concerning the nature of

respondent's work, the circumstances surrounding his assignment to Central Narcotics, the demeanor of the witnesses, his impairment of recall and based his decision "solely out of the peculiar circumstances of this case." (Pet. App. D). Based on the principles enunciated in *Sisson*, respondent contends that the action of the court was tantamount to an acquittal and involved a final determination in defendant's favor for purposes of analysis of the applicability of the Double Jeopardy Clause.

Furthermore, the respondent submits that it is not necessary that the trial court's decision be considered an acquittal in order to invoke the Double Jeopardy Clause.

The petitioner argues that only acquittals are inviolably preserved by the Fifth Amendment. This court has recently rejected that notion. *Finch v. United States*, *supra*. In Finch, after hearing the evidence, the trial judge dismissed the information for failure to state an offense. The dismissal was granted prior to the declaration of guilt or innocence. In that sense, there was no acquittal. However, this court, citing *United States v. Jenkins*, 420 U.S. 358, held that the Circuit Court of Appeals was without jurisdiction to hear the appeal. *Id.* Thus, it is clear that a decision by the court following presentation of all the evidence will bar an appeal despite the fact that the ruling is not an acquittal.

Finch also cited the court's most recent decision concerning double jeopardy. *Lee v. United States*, *supra*. The language in *Lee* is directly applicable to the instant situation. While the holding essentially refused to apply the Double Jeopardy Clause to prevent a trial, there are significant variances between the facts in *Lee* and this case. First, the points of similarity should be noted.

There was no general finding of guilt or innocence in *Lee* as in this case. *Lee v. United States*, *supra*, at n.4. Also, the decision of the trial court in each case was rendered after all of the evidence from both sides had been presented.[3] At this juncture, the fact patterns in the two cases diverge.

The *Lee* opinion proceeded from the premise that the lower court's action should be considered a declaration of a mistrial when it ruled that the information was defective. *Lee v. United States*, *supra*, 53 L.Ed2d at 86. Clearly, the action of the judge in the instant case was not a declaration of mistrial. Nothing occurred during the course of the trial that required a dismissal nor was the fatal error of the government something that could be corrected on retrial as the defective information in *Lee* was. Rather, the reason for dismissal of Count I was due to the activities of the government that took place *before* trial. Furthermore, that error resulted in prejudice to the respondent because of total lack of recall which, obviously, could never be restored no matter how many retrials were permitted.

Consequently, the decision by the lower court herein was functionally distinguishable from a mistrial. *Cf. Lee v. United States*, *supra*. This case more closely resembles the situation in *United States v. Jenkins*, *supra*, which also did not involve an acquittal. However, the lower court terminated the trial in the defendant's favor prior to a verdict which could have resulted in conviction or acquittal. That case was tried to the court, and, after hearing all the evidence, the judge dismissed the

[3] A jury having been empanelled, jeopardy had attached, *Downum v. United States*, 372 U.S. 734.

indictment which effectively granted a motion that had been filed prior to the commencement of trial. The dismissal was based on an interpretation of the relevant law. However, the Court, in review, was uncertain whether the dismissal necessarily involved a finding of facts which would have resulted in a guilty verdict had the government's proposed interpretation of the law been applied. As a consequence, the opinion noted that a retrial would be necessary should the government prevail on appeal. *United States v. Jenkins, supra,* 420 U.S. at 370.

That factor was significant in view of the Court's decision in the companion case, *United States v. Wilson, supra.* In *Wilson*, defendant had presented a pretrial motion to dismiss for preindictment delay which paralleled respondent's motion at issue in this case. A pretrial hearing was held establishing prejudice occasioned by the loss of a key witness during the delay. However, the trial court denied the motion and ordered the case to trial. After presentation of all evidence, the jury returned a verdict of guilty. The petitioner presented several post-trial motions. Without ruling on these motions, the trial judge overruled the jury and dismissed the indictment due to the delay previously raised in the defendant's pretrial motion. The opinion did not find it necessary to determine whether the trial judge's action was an acquittal under the reasoning of *Sisson. Id.* at 336. Rather, the Court concluded that the appropriate focus should be on the Double Jeopardy Clause's prohibition of multiple trials. The Court stated:

> "The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial."

United States v. Wilson, supra at 342.

Therefore, the Court concluded the constitutional protection of the Double Jeopardy Clause against government appeal attaches only where there is a danger of subjecting the defendant to a second trial for the same offense.[4] The Court ruled that with the amendment of 18 U.S.C. §3731, the only limitation on government appeal is the Double Jeopardy Clause. *Id.* at 339. The opinion went on to note that "[W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended" and "[s]ince reversal on appeal would merely reinstate the jury's verdict (in *Wilson*) review of such an order does not offend the policy against multiple prosecutions." *Id.* at 344-45. The jury had already found the petitioner guilty and a reversal on appeal would merely mean the jury verdict would be allowed to stand. The Court noted that:

> "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law *when that error could be corrected without subjecting him to a second trial before a second trier of fact.*" (emphasis supplied)

Id.

---

[4] The opinion refused to overturn the *Sisson* decision barring appellate review, although the defendant had been found guilty by a jury, because *Sisson* was nonreviewable primarily for statutory, as opposed to constitutional reasons, not relevant in the *Wilson* case.

The *Jenkins* decision pointed to this reasoning as the primary principle of *Wilson* in observing:

> "We hold today in *Wilson, supra*, that the Double Jeopardy Clause does not bar an appeal when an error of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt. But because of the uncertainty as to the basis for the District Court's action here, *Wilson* does not govern this case."

United States v. Jenkins, supra, 420 U.S. at 368.

The uncertainty, noted previously in this brief, refers to the lack of a finding of actual guilt under the law proposed by the government. The trial proceedings in *Jenkins* did not result in either a verdict or finding of guilt. However, the opinion considered it of critical significance that the lower court proceedings had resulted in a decision favorable to the petitioner:

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not a resolution of the factual issues against the Government" . . . "But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. §3731 [18 USCS §3731] that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and removal. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in the defendant's favor."

Id. at 369-70.

As with *Jenkins*, the facts herein are distinguishable from *Wilson*. In this case the respondent was not found guilty at the trial level. On the contrary, a full trial of all issues bearing on the elements of the offense was conducted after the jury had been empanelled. Unlike the facts in *Serfass v. United States*, 420 U.S. 377, jeopardy had attached. At the conclusion of the trial, a final decision in favor of the respondent was rendered by the dismissal of Counts I and II by the Court and Count III by the jury. These are precisely the circumstances alluded to in *Jenkins*. If the government were permitted to appeal, a reversal would result in a plenary retrial of issues raised in the respondent's previous trial where all of the issues bearing on the elements of the offense were completely litigated and considered by the court in ordering the dismissal of Counts I and II. Unlike *Wilson*, there is no contrary verdict to reinstate. The judge and the jury have effectively acquitted the respondent and the only way the government can prevail in this case is via a retrial which is barred by the Double Jeopardy Clause.

The basis for respondent's contention that these facts are distinguishable from a mistrial, is found in the court's discussion of *Jenkins* set forth in *Lee*. Petitioner incorrectly assumes that this court analyzed *Jenkins* on the premise that it involved an acquittal. (Br. 19). This assumption is invalid in view of the court's statement in *Lee* that it did not consider when rendering the opinion whether the facts in *Jenkins* amounted to an acquittal. *Lee v. United States, supra*, 53 L.Ed2d at 87, n.8. As stated in *Lee* "[T]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged." *Id.*

Applying that test to the instant case, it is clear that the trial on Count I terminated in the respondent's favor. When the judge ruled on the motion to dismiss at the conclusion of the proofs, he did so on the basis of the intentional nature of the delay coupled with prejudice to the respondent. That prejudice related to his inability to recall the events on the date of the offense charged in Count I due to the peculiar nature of the respondent's work. The court also noted the unsatisfactory nature of the evidence against the defendant due to the inability of the informant who testified for the government to recall events. With this basis for dismissal, clearly the trial court contemplated an end to further prosecution. Loss of memory, unlike indictments when defective, cannot be restored or repaired.[5] Consequently, not only is it impossible to correct the error in a second trial, it is certain that the error would be magnified. With this in mind, the order dismissing Count I concluded in respondent's favor on the basis that he could never be prosecuted or convicted for an offense charged. The petitioner acknowledges that fact. (Br. 11, 18)

[5] In fact, as time passes, the degree of prejudice is increased as memory continues to fade. This unique characteristic of errors due to pre-accusation delay was noted by an Eighth Circuit opinion which stated:

> "The remand would provide the government with another chance to convict the appellees by exhaustingly reviewing the record, marshalling the facts and rearguing the case in a manner not previously presented . . . The appellees would be put to further expense, ordeal and anxiety . . . Even if the trial judge were available on remand, there is nothing to *insure that the resultant dimming of the memory will not adversely affect the rights of the appellee.*" *United States v. Jaramillo*, 510 F.2d 808 (8th Cir. 1975)

This situation is precisely what the court referred to in *Lee*. The respondent relies on the specific language in the opinion which states:

> "Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins establishes that further prosecution is barred by the Double Jeopardy Clause."

Lee v. United States, supra, 53 L.Ed2d at 87[6]

This portion of the *Lee* opinion is dispositive of the appeal in this case and clearly establishes the applicability of the Double Jeopardy Clause to preclude a second trial.

B. Respondent's Motion to Dismiss the Indictment Did Not Bar Subsequent Objection to Being Twice Placed in Jeopardy for the Same Offense.

1. A Motion to dismiss made during trial, after having been denied without prejudice prior to commencement of trial, does not deprive the respondent of the protection of the Double Jeopardy Clause.

The petitioner relies on *Lee* for the proposition that the motion to dismiss made by respondent at trial prevents him from claiming double jeopardy in a second trial. (Br. 17) The opinion in *Lee* referred to *United States v. Dinitz* as holding that retrial is permissible when

[6] Petitioner suggests that it would be unjust and perverse to let the judge's error in the lower court go uncorrected. (Br. 2) However, this passage from *Lee* indicates the presence or absence of error on the merits is not relevant to the jurisdictional question presented herein.

the defendant has moved for a mistrial not attributable to prosecutorial or judicial overreaching. 424 U.S. 600. Essentially, the *Lee* opinion concludes that the defendant in that case had moved for a mistrial and, therefore, was not entitled to invoke the Double Jeopardy Clause.

The *Dinitz* decision is simply not relevant to the circumstances of this case. The primary criterion for granting the government appeal in *Dinitz* is the fact that the court granted a *mistrial*. This is why the court in *Lee* relied on the *Dinitz* decision by noting that the facts in *Lee* were functionally indistinguishable from a mistrial. This brief has already elaborated on the various reasons as to why the action taken in district court was not a mistrial, but rather a final decision in his favor based on the judge's conclusion that he could not be prosecuted.

Any attempt to compare the facts in *Dinitz* with the instant situation is fruitless. The facts set forth in that opinion indicated that the defendant was afforded three specific alternatives, two of which involved avoiding termination of the trial by adjournment or proceeding without desired counsel. Similar alternatives were not offered to the respondent herein. Counsel diligently filed his motion to dismiss for pre-accusation delay long before the date of trial in an effort to obtain a pre-jeopardy determination. He was rebuffed in this attempt with the judge noting that the motion might be renewed after presentation of evidence, which meant that the court would not entertain any motion until *after* jeopardy had attached. Thus, the respondent elected to avoid being placed in jeopardy but the court required him to be so exposed before it would consider his motion.

Furthermore, from the recitation of the facts in *Dinitz*, it is clear that the court did not contemplate that the

defendant could not be successfully prosecuted or that proceedings against him were finally terminated.[7] The third alternative afforded the option of a mistrial, but for what purpose? The court said this would permit the defendant to obtain new counsel. Why would the defendant need different counsel if he weren't going to be reprosecuted? If the proceedings were finally terminated, he would have no need for a lawyer. Thus, the opinion justifiably concluded that the lower court did not contemplate an end to all prosecution when the mistrial was granted.[8]

The respondent herein clearly did not engage in the elaborate evaluation suggested by the court in *Dinitz* prior to making a motion. The *Dinitz* situation of error occurring during trial caused the opinion to conclude:

> "But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in . . . a second prosecution."

United States v. Dinitz, supra, 424 U.S. at 608.

[7] The petitioner herein concedes that the court dismissed with prejudice and concluded the defendant would not be reprosecuted. (Br. 11).

[8] The petitioner's suggestion that the respondent wanted his trial terminated knowing he could be reprosecuted is without basis. This is so, particularly in view of respondent's decision to forego a mistrial during testimony of government witness, Clifford Best, which included prejudicial testimony. The respondent through his counsel stated that he wished to have his fate determined during the ongoing trial and declined to request a mistrial despite ample grounds therefor.

When prejudicial error occurs in front of the jury, it may be said, as in *Dinitz*, that the particular proceeding is tainted and warrants a mistrial. In the instant case, there was no error occurring during trial before the jury. The factfinders were not "tainted". The basis for dismissal involved a decision that the defendant could not be prosecuted based on the evidence presented at trial. There was no suggestion that the jury had been contaminated, justifying the empanelling of a new group of factfinders. Regardless of which panel of jurors hear the evidence in this case, the court concluded, after jeopardy had attached, that the prosecution must end. The pre-accusation delay did not increase the probability of conviction before the particular jury empanelled. The court concluded that the prosecution was defective for reasons that could not affect one jury more or less profoundly than another.

2. The mere possibility of a motion in arrest of judgment, when not made, does not determine whether the Double Jeopardy Clause applies where the proceedings have been concluded in a defendant's favor.

The petitioner suggests that the defendant should have postponed the motion to dismiss until after a verdict was rendered by the jury on all three counts. This argument might have some validity were this a situation where the defendant had deliberately deferred a motion to dismiss until after jeopardy attached.[9]

[9] Indeed, the petitioner suggested that respondent had done just that in its brief in support of the petition for writ of certiorari. (Br. 6). This Court has reserved for decision the issue of whether government appeal is permitted when a defendant is afforded the chance to have a pretrial ruling of a legal defense and deliberately defers raising the issue until after he has been placed in jeopardy. *Serfass v. United States*, 420 U.S. 377.

However, in this case, respondent acted with due diligence in presenting arguments to the court. He filed the motion to dismiss due to pre-indictment delay with a number of other petitions within two weeks after arraignment as ordered by the magistrate and local court rule. These pretrial requests were supported by briefs and oral arguments. This is decisively different from the defendant in *Lee* who waited until the threshhold of his trial to raise the motion to dismiss.[10]

It must be remembered that the *respondent* did not request that the judge reserve ruling on the issue until after the trial had commenced. It was the court that ordered the motion denied and declined to reconsider it until after all of the evidence had been presented. (A. 15).[11] The respondent simply abided by the court's ruling and refrained from renewing the motion until after all evidence was presented.

[10] Likewise, this is not the type of hypothetical tactic that was frowned upon in the *Serfass* decision where the defendant deliberately delayed a motion until after jeopardy had attached.

[11] In fact, the procedure followed by the trial judge was most appropriate. In reviewing the merits of a motion such as this, the court must necessarily hear all of the facts of the case to determine whether a defendant has suffered prejudice of a degree that would warrant dismissal. To present all of the evidence in a pretrial hearing would constitute a waste of the court's time and, effectively, require both sides to present all of their evidence twice. This type of motion is not like a motion to suppress which customarily isolates a portion of the evidence for consideration. Prejudice can only be gleaned after an examination of the evidence in total. Consequently, the procedure employed by the trial judge in the instant case has been suggested by reviewing courts. Petitioner concedes this point. (Br. 25).

Petitioner relies on Fed. R. Crim. P. 12(e) to support its petition by saying that the judge erred in deciding the motion after jeopardy attached. Initially it is noted that when the judge denied the pretrial motion and refused to reconsider until after all evidence was presented, Rule 12(e) was not in effect.[12] In addition, the Rule forbids deferral of a decision on a motion where a party's appellate prerogatives are, thereby, restricted. The trial judge did not *defer* the determination of the motion until trial. It denied the motion because the respondent had not sustained his burden in regard to a showing of intentional delay by the government and/or resultant prejudice. The court simply did not find the respondent's position meritorious. However, after the evidence was presented the judge ruled that the burden had been sustained as to both intentional delay and prejudice.[13]

The petitioner's argument based on Rule 12(e) ignores the purpose of the Double Jeopardy Clause which is to bar multiple trials for the same offense and exposing an accused to repeated expense and anxiety. *See, Green, supra.* Petitioner contends that barring retrial after an erroneous dismissal of the indictment would "disserve 'the purpose of law to protect society from those guilty of crimes' ". (Br. 27, n. 21). This type of reasoning has been rejected by this Court. Whether or not the trial judge's decision was erroneous or correct is not relevant to a determination of the applicability of the Double

[12]The effective date for Rule 12(e) was December 1, 1975, and the order denying the motion was entered November 20, 1975.

[13]As petitioner concedes, the nature of this type of motion necessarily requires that the evidence be presented before it could be granted. (Br. 26).

Jeopardy Clause. In *Lee,* the opinion stated that if the trial judge rules that a defendant cannot be convicted, retrial is barred whether the decision is correct or not. *See, Lee, supra.* Therefore, the petitioner's argument as to Rule 12(e) would not be relevant unless, and until, it is determined that the Court of Appeals has jurisdiction to review the decision and order yet another trial. At that point the petitioner could present its position on Rule 12(e) as well as its contention that an insufficient showing of prejudice was made.

Finally, this reasoning ignores one simple fact. Petitioner contends that, since a decision on the motion to dismiss *could* have been deferred until after a jury verdict, the *Wilson* opinion should apply. However, the entire basis for the *Wilson* decision is that the defendant would not be retried, but, rather, a verdict would be reinstated. Respondent submits that the issue is not whether he could avoid further proceedings. Rather, the Double Jeopardy Clause asks "*will* a second trial occur". Obviously, there is no verdict to reinstate here and a retrial *is* necessary with all the attendant cost, anxiety and advantage to the government that the Fifth Amendment forbids. *See, Green v. United States, supra.*

CONCLUSION

The judgment rendered by the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM C. MARIETTI
820 Terrace at Clay
Muskegon, Michigan 49440

ALEXIS J. ROGOSKI
704 Hackley Bank Building
Muskegon, Michigan 49440

Counsel for Respondent